E.G. TAN & CO. (PTE)
(IN LIQUIDATION)

v.

TAN CHONG SAN

MAHKAMAH TINGGI, KUALA LUMPUR
DATO[1] HJ. ABDUL MALEK BIN
HJ. AHMAD J.
[CIVIL SUIT NO. D4-23-1116-87]
7 JANUARY 1993

PRACTICE AND PROCEDURE: Application for leave to withdraw unconditional appearance and file conditional appearance -Application to set aside or stay proceedings on the grounds that the High Court not proper or convenient forum to determine issues-Allegation of non-compliance with s. 23 Courts of Judicature Act 1964-Whether sustainable -Allegation of non-compliance with Rules of High Court 1980 - Whether claim frivolous, vexatious and an abuse of process of Court - Whether application made within reasonable time.

The plaintiffs' were share brokers and members of the Stock Exchange Singapore Ltd. The plaintiffs' made sales and purchases of shares upon the instructions and on behalf of the defendant. The plaintiffs' claimed the amount due and owing on contra losses incurred as at 30 November 1986.

The defendant applied to withdraw his unconditional appearance and to file a conditional appearance, five years after filing his appearance and defence, on the ground that the statement of claim did not show that the plaintiffs' case fell within the ambit of s. 23(1) of the Courts of Judicature Act 1964 ("the Act").

The defendant contended that the plaintiffs' had not shown in the statement of claim that the defendant was resident or has a place of business in West Malaysia as required by s. 23(1) of the Act and as such the High Court was not vested with jurisdiction in the matter. The defendant further claimed that the writ of summons failed to comply with the Rules of the High Court 1980 and sought to set aside or stay the writ on the grounds of it being frivolous, vexatious and an abuse of the process of Court.

Held:

[1] Unconditional appearance was entered after the defendant had retained his present solicitors and there was no averrment that it was entered by mistake. The defendant had already taken steps in several other interlocutory applications before making this application. There was no reason in the circumstances to allow appearance to be withdrawn five years later.

[2] By entering unconditional appearance, the defendant had submitted to the jurisdiction of the Court. Since the address for service pleaded in the statement of claim is actually the defendant's residential address as averred to in his affidavits, it is not necessary to correct the pleadings and this irregularity cannot be a sufficient ground to set aside or stay the proceedings on the question of convenient forum.

[3] Any application to set aside any proceedings for irregularity under O. 2 r. 2(1) or for being frivolous, vexatious and an abuse of the process of Court under 0.18 r. 19 of the Rules of the High Court 1980 has to be made within a reasonable time and the lapse of five years was not reasonable.

[Defendant's application dismissed with costs].

Cases referred to:

Firth v. John Mowlem & Co. Ltd. & Anor. [1978]3All ER331 (foll)

Hill v. Luton Corporation[1951] 1 All ER 1028 (refd)

Km. N. Sp.N. Valliamal Achi (f) v.A.R.S. Nachiappa Chettiar[19S7] 23 MLJ 27 (refd)

Somportex,Ltd.v.Philadelphia Chewing Gum Corporation[1968]3AUER26 (foll)

Sirdar Gurdyal Singh v. The Rajah of Faridkote [1894] AC 670 (foll).

Sheldon v. Brown Bayley's Steelworks, Ltd. & Anor. [1953] 2 All ER 894 (foll)

The "Avro International" The "Avro Venture" "Avro International" (Owners of) v. Arabian Marine Bunkers Sales Co. Ltd. & Anor. [1988] 1 MLJ 147 (foll)

Cases listed at the end of the judgment as "cases referred to":

Malayan Banking Bhd. v. International Tin Council [1989] 3 MLJ 286.

United Malayan Banking Corporation Bhd v. Soo Lean Tooi & Ors. [1984] 1 MLJ 47.

Aron Salomon (pauper) v.A. Salomon And Company, Limited [1897] AC 22.

The Attorney-General & Ephraim Hutchings (Relator) v. The Directors, &c., of the Great Eastern Railway Company [1879-80] 5 App. Cas.473.

Evans v. Bartlam[1937]AC473.

Trower & Sons Ltd. v. Ripstein [1944]AC 254

Mee Ying Enterprise Jewellers (suing as a firm) v. Che Jah bt. Abdullah [1992] 3 CLJ 1617

Lam Kok Trading Co. (Pte.) Ltd. & Anor. v. Yorkshire Switchgear and Engineering Co. Ltd. [1976] 1 MLJ 239.

Coburn v. Colledge [1897] 1 QB 702.
Central Electricity Generating Board v. Halifax Corporation [1962] 3 All ER 915.
Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co. Sdn. Bhd. [1975] 2 MLJ 115
Blay v. Pollard and Morris [1930] 1 KB 628
In Re Estate of Lee Siew Kow decd., Gan Eng Neo (w) and 2 Ors. v. Yeo Siew Neo (w) [1951] 17 MLJ 224
Phillips v. Phillips & Ors. [1878) 4 QBD 127
Millington v. Loring [1880] 6 OBD 190.
Anthony v. Anthony (nee Pragasam)[1959]25MLJ42.
Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor. [1979] 2 MLJ 101
Rothmans of Pall Mall (Overseas) Ltd. and others v. Saudi Arabian Airlines Corporations [1979] 1 S&B Av.R VII/I.
Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour & Manpower & Anor. [1983] 2 MLJ 54
Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers [1983] 1 MLJ 175
Essex County Council v. Essex Incorporated Congregational Church Union [1963] AC 808
Secretary of State for Employment v. Globe Elastic Thread Co. Ltd. [1978] 1 QB 86.
Weldon v. Neal [1887] 19 GBD 394.
Ramdutt Ramkishen Dass v. E.D. Sasson & Co. AIR [1929] 103
Government of Malaysia v. Mohamed Amir bin Hassan [1986] 1 MLJ 224
Distillers Co (Bio-Chemicals) Ltd. v. Thompson (by her next friend Arthur Leslie Thompson) [1971] 1 All ER 694.
Jackson v. Spittall [1870] LR CP 542
Cuban Atlantic Sugar Sales Corporation v. Compania De Vapores San Elefterio Limitada [1960] 1 All ER 141
Northey Stone Company v. Gidney [1893] 1 QB 99
Capital Music Centre (East Coast) Sdn. Bhd. v. Koh Chit Kin & Anor. [1988] 2 CLJ 287
Sova Sdn. Bhd. v. Kasih Sayang Realty Sdn. Bhd. [1988] 2 MLJ 268
Bank Bumiputra Malaysia Berhad & Anor. v. Lorrain Esme Osman;Bank Bumiputra Malaysia Berhad & Anor. v. Lorrain Esme Osman & Ors. [1987]2 MLJ 633
Coupland v. Arabian Gulf Petroleum Co. [1983] 2 All ER 434
Spiliada Maritime Corporation v. Cansulex Ltd. [1987] 1 AC 460
The "Jalakrishna" [1983] 2 LLR 628

Legislation referred to:
Courts of Judicature Act 1964, s. 23(1)
Rules of the High Court 1980, O. 2 r. 2(1), O. 6, 0.18 r. 19, O. 21 r. 1

Other sources referred to:
The Supreme Court Practice 1979, Vol. 1, Part 1, p. 34
Mallal's Supreme Court Practice, Vol. 1, 2nd Edn, p. 68

a For the plaintiff - L.H. Ng; M/s. Skrine & Co.
For the defendant - Chandran G. Nair, (Ravindra Kumar & Philip Leong Choo Kong with him); M/s. Thevin, Chandran, Siva, Wong & Jamal

JUDGMENT

***b* Hj. Abdul Malek bin Hj. Ahmad J:**

The plaintiffs are a private company incorporated in the Republic of Singapore and are share brokers and members of the Stock Exchange Singapore Limited. They had been ordered to be wound up by the Singapore High Court on 1 August 1986. This action had been *c* brought at the instance of the three joint and several liquidators of the plaintiffs appointed by the Singapore High Court on the same day as the winding up. The defendant's address of service is at 93 Jalan Kampong Simee, Ipoh, Perak.

d It had been pleaded in the statement of claim filed on 3 February 1987 that at the request and upon the instructions of the defendant, the plaintiffs had made sales and purchases of shares on behalf of the defendant and based on the amounts due and owing on contra losses including interest accrued as at 30 November *e* 1986 at the agreed rate the full particulars of which had been rendered to the defendant, the defendant was indebted to the plaintiffs in the sum of $907,159.42 Singapore dollars with interest on the sum stated at the rate of 16.425 per cent per annum from 1 December 1986 to the date of final payment. A written demand *f* for the said sums had been made on 17 December 1986 but had met with no response.

In his statement of defence filed on 7 July 1987, the defendant had admitted that there were certain transactions for the purchase and sale of shares in public companies between him and *g* the plaintiffs but had denied all the other particulars in the statement of claim. He had further pleaded that the plaintiffs had acted unlawfully and in breach of the rules and terms governing the customer-broker relationship as a consequence of which the plaintiffs' claim *h* was unenforceable.

By summons in chambers filed on 26 October 1987, the plaintiffs had applied for an order that judgment be entered for the plaintiffs against the defendant for the amounts prayed or alternatively that the defence of the defendant be struck out but this was dismissed with costs by the learned Senior Assistant Registrar

on 9 February 1990. The appeal against this decision was withdrawn by the plaintiffs on 18 July 1990 and consequently had been dismissed with costs.

On 9 March 1992, the defendant had applied by summons in chambers for an order that he be given leave to amend his statement of defence and that the plaintiff as a foreign company be ordered to pay security for costs. When the matter was called on 16 April 1992 before the learned Senior Assistant Registrar, the parties had intimated that they were in the process of settling the application and on 5 May 1992 the plaintiffs had consented to the amendments and to pay RM10,000 to the defendant as security for costs. For the amendments, the learned Senior Assistant Registrar had also ordered costs against the defendant.

The main suit had been set down for trial on 10 September 1992 but on 2 September 1992, the defendant had filed a summons in chambers asking firstly that the defendant be given leave to withdraw his unconditional appearance and file a conditional appearance, secondly that the proceedings be set aside or stayed on the ground that the High Court of Malaya at Kuala Lumpur is not the proper or convenient forum to determine the issues, alternatively that the specially indorsed writ of summons and service thereof be set aside or stayed for being in non-compliance with *s.* 23 of the Courts of Judicature Act 1964 (hereinafter "the Act"), thirdly that the writ of summons be set aside or stayed for being in non-compliance with the Rules of the High Court 1980 (hereinafter "the Rules") and for being frivolous, vexatious and an abuse of the process of Court.

Consequently, the hearing date had to be vacated and the application was fixed for hearing on 14 September 1992. On that date, learned Counsel for the plaintiffs had asked for an adjournment to file the affidavit in reply and when the matter was finally heard on 9 October 1992,1 had dismissed the application with costs.

Learned counsel for the defendant's main ground for the application was that the statement of claim did-not show that the plaintiff's case fell within the ambit of s. 23(1) of the Act which is reproduced here for ease of reference:

> 23(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where -
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> (a) the cause of action arose, or
> (b) the defendant or one of several defendants resides or has his place of business, or
> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
> (d) any land the ownership of which is disputed *is* situated,
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> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

He was of the opinion that as this case involved a cause of action that arose in a foreign jurisdiction, the plaintiffs must make it clear in their statement of claim the grounds which would enable them to enforce their claim in the Malaysian Courts. In his view, as the statement of claim only stated that "the defendant has an address of service at 93 Jalan Kampong Simee, Ipoh, Perak", this did not fulfil the requirements of the referred section, in particular paragraph (b) of subsection (1), as service is in no sense a foundation of jurisdiction of the High Court in this country. It was his contention that the pleadings must state that the defendant was resident or has a place of business in West Malaysia before the High Court in Malaya can be vested with the jurisdiction in the matter.

Learned Counsel had further went on to argue that the fact that the defendant had entered unconditional appearance does not preclude him from withdrawing it and that it did not in any way operate as an estoppel as jurisdiction did not originate through the consent of parties and cannot be so established, where it is absent, by such consent. He added that the statement of claim could not be amended at this stage to rectify any defect as it was a nullity *ab initio* and there would be nothing to amend. Further, any amendment would prejudice the defendant's defence of limitation. His final submission was that in cases involving a breach of contract as in this case, jurisdiction is determined by identifying the place where the breach took place which he said was in Singapore which was also where the plaintiffs lived.

It is appropriate to consider the prayers in the defendant's application separately although

there is some amount of overlapping in the second and third prayers. The first prayer is for leave to withdraw his unconditional appearance and to file a conditional appearance. Although this is specially provided for in 0. 21 r. 1 of the Rules, I was persuaded by the ruling in *Somportex, Ltd. v. Philadelphia Chewing Gum Corporation* [1968] 3 All ER 26 to disallow this prayer. There, the Court of Appeal in England had held that the conditional appearance had been entered after competent legal advice and not by mistake and the defendants, an American company, should not be allowed to resile from the election so made as the plaintiffs had continued the English action on the basis of appearance. Accordingly, leave to withdraw appearance was refused and the conditional appearance stood as unconditional subject to any appeal from the order dismissing the application to set aside the writ. They were also of the view that if an appearance was entered by mistake or without authority, leave to withdraw the appearance may be given. In our case, the facts are stronger as unconditional appearance, as opposed to conditional appearance, had been entered on 26 June 1987 after the defendant had retained his present solicitors and mistake had not been averred to in his affidavits. I could therefore find no reason in the circumstances to allow for it to be withdrawn more than five years later. As decided in *Firth v. John Mowlem Co. Ltd. & Anor.* [1978] 3 All ER 331, the relevant rule gave the Court a complete discretion to give leave to withdraw an appearance the exercise of which depended on the facts of each case and on the facts of this case I was more than convinced that this decision was correct especially so when in the last five years the defendant had already taken steps in several other interlocutory applications before making this application.

As for the second and third prayers, it is trite law under 0.6 of the Rules that a writ need not be indorsed with a statement of claim in which case it must be indorsed with a concise statement of the nature of the claim made or the relief or remedies required or with a statement of the amount claimed in respect of the debt or demand and for costs. It follows that either way the provisions of s. 23 of the Act need not be restated therein. Learned Counsel for the defendant had in fact admitted in his submissions that generally, it is actually not necessary to plead the defendant's residence in this country. Apart from the fact that the defendant had already entered an unconditional appearance and had therefore submitted to the jurisdiction of this Court, he had in fact filed not less than eight affidavits giving his residential address which was the same as the address for service stated in the statement of claim. In *Sirdar Gurdyal Singh v. The Rajah of Faridkote* [1894] AC 670, the House of Lords had held that in all personal actions the Courts of the country in which the defendant resides, not the Courts of the country where the cause of action arose, should be resorted to. The Supreme Court Practice 1979 Volume 1 Part 1 at page 34 states that the description or occupation of the defendant need not be stated in the writ but his address must be given with as much exactitude as possible and that a wrong address or a misdescription as to his business, when the defendant is not misled or prejudiced, is not an irregularity sufficient to warrant the setting aside of the writ and service. It is therefore my finding that since the address for service pleaded in the statement of claim is actually the defendant's residential address as averred to in his affidavits, it is not even necessary to correct the pleadings and this irregularity cannot be a sufficient ground to set aside or stay the proceedings on the question of convenient forum.

Mallal's Supreme Court Practice Volume 1 Second Edition at page 68 had pointed out that the effect of an unconditional appearance is a waiver of any irregularity there may be and a submission to the jurisdiction of the Court as per *Sheldon v. Brown Bayley's Steelworks, Ltd. & Another* [1953] 2 All ER 894 but it is not a waiver where the service is a nullity as per *Km. N. Sp. N. Valliamal Achi (f) v. A.R.S. Nachiappa Chettiar* [1957] 23 MLJ 27 which is of course not applicable in this case. In *The "Avro International" The "Avro Venture" "Avro International" (Owners of) v. Arabian Marine Bunkers Sales Co. Ltd. & Anor.* [1988] 1 MLJ 147, the Court of Appeal in Singapore had decided that the effect of entering an unconditional appearance is twofold, that is, it waives any irregularity of the writ or its service and that the defendant is considered to have submitted to the jurisdiction of the Court. They further held that a defendant who wishes to set aside the writ or its service for non-compliance of the rules of procedure or who wishes to challenge the jurisdiction of the Court must therefore enter a conditional appearance and

that in their case, the appellants' unconditional appearances were fatal to their right to object to jurisdiction. To my mind, the same ruling would apply in this case.

It was also my finding that, in the light of the wording in O. 2 rule 2(1) of the Rules and decided authorities, any application to set aside any proceedings for irregularity under that rule, or for being frivolous, vexatious and an abuse of the process of Court under 0.18 r. 19 of the Rules, has to be made within a reasonable time and my view was that five years in this case, especially so when the hearing date had already been fixed and several other applications had been made before that, was certainly not a reasonable time. On this ground alone, the third prayer must also fail.

All factors considered, I could only come to the conclusion that the defendant's application ought to be dismissed with costs which I so ordered.

EDMUND LAU YICK MAN

v.

PUBLIC PROSECUTOR

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[CRIMINAL APPEAL NO. KG. 47 OF 1991]
11 DECEMBER 1992

CRIMINAL LAW: Charge under s. 471 Penal Code - Accused found guilty and sentenced Appeal against conviction and sentence - Whether conviction sustainable - Whether sentence unreasonable and manifestly excessive.

The appellant was charged with the offence of dishonestly using as genuine a document, for the purposes of securing overdraft facilities from a bank, which document he knew at the time of using it to be a forged document.

After hearing the case for the prosecution and the defence the learned Magistrate found the appellant guilty of the offence charged and sentenced him to 12 months imprisonment and a fine of RM5,000..

The appellant appealed against both his conviction and sentence.

Held:

[1] There were no grounds for reversing the learned Magistrate's conviction of the Accused. The learned Magistrate was not shown to be wrong in rejecting the evidence of the appellant and accepting as the truth the evidence of the prosecution witnesses which clearly established the case of the prosecution beyond all reasonable doubt.

[2] The appellant was a first offender and a man with a high educational background whose career would be affected by the mere fact of conviction. No one had suffered financial loss from the acts of the appellant. Sentence of imprisonment was unreasonable and excessive and is set aside. The sentence of fine affirmed.

[Appeal against conviction dismissed. Appeal against sentence allowed in part].

Casesreferred to:

Cheong Khean Sheng v. PP [1970]2 MLJ 175 (refd)
Ooi Teik Chin v. PP [1971] 1 MLJ51 ***(refd)***
PP v. Mohamad Fathi bin Haji Ahmad[1979]2MLJ 75 ***(refd)***
Winter v. Boynton (Times 6/2/1991 CA) (refd)